84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 856. 84

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

PELHAM G. WODEHOUSE,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, N. Y. C.

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

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Opinions Below.

The opinions of the Tax Court and Circuit Court of Appeals are reported respectively at 8 T. C. 637 and 166 F. 2d 986.

Jurisdiction.

The grounds on which the jurisdiction of this Court is invoked by the petitioner under Section 240(a) of the Judicial Code is an alleged conflict with the decision of the Second Circuit Court of Appeals in *Rohmer* v. *Commissioner*, 153 F. 2d 61, cert. denied 328 U. S. 862, and the existence of an important question which should be settled by this Court.

Argument.

The respondent respectfully urges that this application for a writ of certiorari be denied, for the reason that whether there is any conflict between the Second and Fourth Circuits on the question here involved cannot be known until the Second Circuit hears and decides the respondent's appeal from the same decision of the Tax Court for the year *1940*, 8 T. C. 537, which for the years 1938 and 1941 was reversed in the Fourth Circuit, 166 F. 2d 986.

The taxpayer's returns for 1938 and 1941 were filed in Baltimore, for 1940 in New York. Accordingly, he filed appeals from the adverse portions of the Tax Court's decision (the main point here in question, being the same in all three years) in the Fourth and Second Circuits, respectively. He then requested the Commissioner to stipulate that his 1940 appeal be likewise heard in the Fourth Circuit. This request was refused. The taxpayer was accordingly required to prepare substantially a duplicate record in the Second Circuit. The Commissioner twice successfully opposed the taxpayer's motion to advance the hearing of the Second Circuit appeal, which cannot now take place till the fall.

The major question here involved is not, as stated in the Commissioner's petition at page 2, the sale of serial rights for a fixed lump sum by a non-resident alien (as in *Rohmer* v. *Commissioner*, 153 F. 2d 61, cert. denied 328 U. S. 862), but the sale for a fixed lump sum of the whole copyright, including the serial rights, but reserving all other rights (which in this case proved to be of insubstantial value compared to the serial rights, a fact probably important under the *Rohmer* decision), this being in no way a tax

device, but the usual form of such transactions with the Curtis Publishing Co.

The opinion of the Fourth Circuit Court of Appeals points out this distinguishing feature, before going on to express its disagreement with the general reasoning of the *Rohmer* decision. While in some respects this opinion may therefore be said to be in conflict with *Rohmer*, it is impossible to say whether the conflict is merely by way of *dicta* until the Second Circuit hands down its 1940 *Wodehouse* decision. And it is entirely impossible to say that there is any conflict between the Fourth and Second *Circuits* at this time, for the further reason that the *Rohmer* case itself was admittedly in conflict with the Second Circuit's own decision only two years before in *General Aniline & Film Corp.* v. *Commissioner*, 139 F. 2d 759, and also seemed to be in conflict with another of its recent decisions.—*Goldsmith* v. *Commissioner*, 143 F. 2d 466, cert. denied 323 U. S. 774.

It may also be noted that on another point, not involved in this application, the *Rohmer* decision "overruled *sub silentio Cohan* v. *Commissioner*, 39 Fed. (2d) 540 (C. C. A. 2), a decision which had stood for sixteen years" and "is directly contrary to *Helvering* v. *Taylor*, 293 U. S. 507, 513, 515", in the words of Senior Judge Learned Hand, concurring in *Molnar* v. *Commissioner*, 156 F. 2d 924, 926.

This Court declined in the *Rohmer* case to grant certiorari, on the ground presumably that it would not settle conflicts existing only within the Second Circuit. For the same reason, we respectfully submit that certiorari should not be granted in this case, since it seems quite likely that the Second Circuit Court of

Appeals will decide its *Wodehouse* appeal in the fall in the taxpayer's favor, either distinguishing it from *Rohmer* on the facts, or overruling *Rohmer* in favor of its previous decisions in *General Aniline & Film* and *Goldsmith*.

As bearing on the likelihood of such action, and without repeating the well-reasoned arguments of the Fourth Circuit Court of Appeals herein, or analyzing in detail at this time the statutes and regulations from 1913 to date (none of which lend any support to the petitioner) we only call the attention of the Court to one point of statutory history which in itself seems to us decisive. The *Rohmer* opinion conceded (156 F. 2d 61, 64) that to tax the lump sum payment in that case required the deletion of the words "annual or periodical" from the statute, as amended in 1936, which expressly taxes only "fixed or determinable annual or periodical gains, profits and income". Now it so happens that the 1936 Revenue Act, which contained the drastic innovations in the methods of taxing non-resident aliens which have in this respect remained unchanged ever since, made two specific additions to the same sentence in the statute in which *Rohmer* makes the deletion (Sec. 143 (b) I. R. C., providing for withholding at the source, which is conceded in *Rohmer* and at page 10 of the petition herein to have the same coverage as Sec. 211 (a) (1)). The relevant parts of this sentence we quote below, indicating the two 1936 additions by supplied italics.

> "All persons, * * * having the control, receipt, custody disposal, or payment of interest * * *, *dividends*, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical

gains, profits, and income *(but only to the extent that any of the above items constitutes gross income from sources within the United States)* of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States * * * shall deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof * * *".

The addition of *dividends* to the taxable category was an important change of substance, referred to in the Committee reports; the added explanation in the parenthesis following was merely declaratory of existing law, and was not mentioned in those reports. The key words "annual or periodical" (which have appeared in the corresponding sections of every Revenue Act from 1913 to the present) appear twice in the above quoted sentence.

"Excision is a 'desperate remedy', * * * only a last resort, to be availed of when all efforts to reconcile the inconsistency by construction have failed", as Judge Cardozo said in *Matter of Buechner*, 226 N. Y. 440, 443.

It seems particularly unnecessary to impute to Congress such a careless oversight as the failure to strike out the twice recurring words "annual or periodical", when not only was the very sentence in which the supposed oversight occurred, amended in that year by the express addition of *dividends* two lines above the first use of the "periodical" phrase (the only vital change from 1913 to date), but one line below Congress inserted the clarifying parenthesis of meticulous

caution quoted above. If ever the motto "*expressio unius est exclusio alterius*" were applicable, it would seem to be here, where amendatory changes were made just before and just after the phrase which *Rohmer* held Congress intended to strike out at that time.

But perhaps even more decisive of the legislative purpose is the second use of the phrase in the concluding part of the same sentence. It would be strange indeed if a phrase meant to be omitted were overlooked not once but twice. But it is much more striking that in the second instance, the words "annual or periodical", rejected in *Rohmer* as meaningless, are the only words used by Congress to describe the income covered, showing that apparently this phrase is in truth the ultimate touchstone of the whole withholding section.

For the reasons above, we believe that the decision of the Second Circuit in the companion *Wodehouse* appeal (the hearing of which before the summer recess was successfully opposed by the petitioner) will show that the alleged conflict with the Fourth Circuit does not in fact exist. The alleged confusion which the petitioner anticipates from the decision below will no doubt also be clarified by that decision.

As to the claim of the petitioner that the decision below confers an unfair advantage on foreign authors, the Court will note that *Rohmer* admits, and so does petitioner, that the outright sale of the whole copyright by a non-resident alien author is exempt from tax, as is the sale of wheat, stocks, or realty. Petitioner's theory would exempt from tax altogether a foreign author who sold his whole copyright at once, including serial, book, dramatic, and movie rights, but

tax at full surtax rates an author who sold the same rights piecemeal.

It would seem quite unfair so to discriminate among foreign authors, and equally unfair to single out foreign authors for taxation, while exempting foreign speculators in stocks, commodities and real estate. Congress has made no such invidious distinction, and it would be strange indeed if the courts should do so.

CONCLUSION.

The decision below is correct and probably involves no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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